

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BARBARA LYNN CHAVEZ,

CV F 05-00490 REC DLB HC

Petitioner,

**ORDER DIRECTING RESPONDENT TO  
SUBMIT RESPONSIVE PLEADING**

V.

## ORDER SETTING BRIEFING SCHEDULE

## GLORIA HENRY, WARDEN,

**ORDER DIRECTING CLERK OF COURT TO  
SERVE ORDER ON ATTORNEY GENERAL**

## Respondent.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On May 19, 2005, the Court issued an order directing Respondent to file a response to the petition within ninety (90) days from the date of service. Over ninety (90) days have passed and no response was received.

The Court has reviewed the docket in this case and it appears that the Clerk of Court inadvertently did not electronically serve the Court's order on Respondent. As such, Respondent did not receive notice of the court's order and cannot be faulted for her failure to respond. The Court apologizes for any inconvenience or confusion and are advised that a new briefing schedule will be set by this order.

The Court has conducted a preliminary review of the Petition. Accordingly, pursuant to Rule 4 of the Rules Governing Section 2254 Cases and Rule 16 of the Federal Rules of Civil

1 Procedure,<sup>1</sup> the Court HEREBY ORDERS:

2       1. Respondent SHALL SUBMIT a RESPONSIVE pleading by filing one of the  
3 following:

4           A. AN ANSWER addressing the merits of the Petition and due within  
5 **NINETY (90)** days of the *date of service* of this order. Rule 4, Rules  
6 Governing Section 2254 Cases; Cluchette v. Rushen, 770 F.2d 1469,  
7 1473-1474 (9<sup>th</sup> Cir. 1985) (court has discretion to fix time for filing an  
8 Answer.).

9           – Respondent SHALL INCLUDE with the Answer any and all  
10 transcripts or other documents necessary for the resolution of the  
11 issues presented in the Petition. Rule 5 of the Rules Governing  
12 Section 2254 Cases.

13           – Any argument by Respondent that Petitioner has *procedurally*  
14 *defaulted* a claim(s) SHALL BE MADE in an ANSWER that also  
15 addresses the merits of the claims asserted. This is to enable the  
16 Court to determine whether Petitioner meets an exception to  
17 procedural default. See, Paradis v. Arave, 130 F.3d 385, 396 (9<sup>th</sup>  
18 Cir. 1997) (Procedurally defaulted claims may be reviewed on the  
19 merits to serve the ends of justice); Jones v. Delo, 56 F.3d 878 (8<sup>th</sup>  
20 Cir. 1995) (the answer to the question that it is more likely than not  
21 that no reasonable juror fairly considering all the evidence,  
22 including the new evidence, would have found Petitioner guilty  
23 beyond a reasonable doubt necessarily requires a review of the  
24 merits).

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26       1The Federal Rules of Civil Procedure are “applicable to habeas corpus proceedings to the extent that the  
27 practice in such proceedings are not set forth in the statutes of the United States and has heretofore conformed to the  
28 practice of civil actions.” Fed.R.Civ.P. 81(a)(2). Rule 11 also provides “the Federal Rules of Civil Procedure, to the  
extent that they are not inconsistent with these rules, may be applied, when appropriate, to the petitions filed under  
these rules.” Rule 11, Rules Governing Section 2254 Cases.

1                   – Petitioner's TRAVERSE, if any, is due **THIRTY (30)** days from  
2                   the date Respondent's Answer is filed with the Court.

3                  B. A MOTION TO DISMISS due within **SIXTY(60)** days of the *date of*  
4                   *service* of this order based on the following grounds:<sup>2</sup>

5                  i. EXHAUSTION - 28 U.S.C. § 2254(b)(1). A Motion to Dismiss  
6                   for Petitioner's failure to exhaust state court remedies SHALL  
7                   INCLUDE copies of all the Petitioner's state court filings and  
8                   dispositive rulings relevant to the examination of the statute  
9                   limitations issue as required by Ford v. Hubbard, 330 F.3d 1086  
10                   (9<sup>th</sup> Cir. 2003) and Kelly v. Small, 315 F.3d 1063 (9<sup>th</sup> Cir. 2003);

11               ii. STATUTE OF LIMITATIONS - 28 U.S.C. § 2244(d)(1). A  
12                   Motion to Dismiss the Petition as filed beyond the one year  
13                   limitations period SHALL INCLUDE copies of all Petitioner's  
14                   state court filings and dispositive rulings.

15               iii. SECOND OR SUCCESSIVE Petitions - 28 U.S.C. § 2244(b). A  
16                   Motion to Dismiss the Petition on the basis of § 2244(b) SHALL  
17                   include a copy of the previously filed federal Petition and  
18                   disposition thereof.

19               2. OPPOSITIONS to Motions to Dismiss SHALL be served and filed within  
20                   EIGHTEEN (18) days, plus three days for mailing. All other Oppositions SHALL  
21                   be served and filed within EIGHT (8) days, plus three days for mailing. REPLIES  
22                   to Oppositions to Motions to Dismiss SHALL be served and filed within eight (8)  
23                   days, plus three days for mailing. Replies to Oppositions to all other Motions

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26                   <sup>2</sup>Rule 4 of the Rules Governing Section 2254 Cases provides that upon the court's determination that  
27                   summary dismissal is inappropriate, the "judge shall order the respondent to file an answer or *other pleading . . . or*  
28                   *to take such other action as the judge deems appropriate.*" Rule 4, Rules Governing Section 2254 Cases (emphasis  
                 added); see, also, Advisory Committee Notes to Rule 4 and 5 of Rules Governing Section 2254 Cases (stating that a  
                 dismissal may obviate the need for filing an answer on the substantive merits of the petition and that the Attorney  
                 General may file a Motion to Dismiss for failure to exhaust.); also, White v. Lewis, 874 F.2d 599, 60203 (9<sup>th</sup>  
                 Cir.1989) (providing that Motions to Dismiss pursuant to Rule 4 are proper in a federal habeas proceeding.)

1            SHALL be served and filed within eight (8) days, plus three days for mailing. If  
2            no opposition is filed, all motions are deemed submitted at the expiration of the  
3            opposition period.

- 4            3. Unless already submitted, both Respondent and Petitioner SHALL COMPLETE  
5            and RETURN to the Court along with the Response or Motion to Dismiss, a  
6            Consent form indicating whether the party consents or declines to consent to the  
7            jurisdiction of a the United States Magistrate Judge pursuant to Title 28 U.S.C.  
8            § 636(c)(1).
- 9            4. RESPONDENT SHALL submit a Notice of Appearance as attorney of record  
10            within **SIXTY (60)** days of the date of service of this order for purposes of service  
11            of court orders. See, Local Rule 83-182(a), 5-135(c).
- 12            5. The Clerk of the Court is DIRECTED to SERVE a copy of this order along with a  
13            copy of the PETITION and any exhibits/attachments, on the Attorney General or  
14            his representative.<sup>3</sup>

15            All motions shall be submitted on the record and briefs filed without oral argument unless  
16            otherwise ordered by the Court. Local Rule 78-230(h). All provisions of Local Rule 11-110 are  
17            applicable to this order.

18            IT IS SO ORDERED.

19            Dated: September 7, 2005  
20            3b142a

21            /s/ Dennis L. Beck  
22            UNITED STATES MAGISTRATE JUDGE

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27            <sup>3</sup>If, however, the Petition was filed on January 3, 2005, or thereafter, the Clerk of the Court need not serve a  
28            copy of the Petition on the Attorney General or his representative. A scanned copy of the Petition is available in the  
                  Court's electronic case filing system ("CM/ECF").